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In The Supreme Court of the United States

BCI COCA COLA BOTTLING COMPANY OF LOS ANGELES,

Petitioner

v

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC , AND MARIANNE SAWICKI, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The National Employment Lawyers Association ("NELA") is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York, formed to redress injustice caused by racial discrimination and to assist African-Americans in securing their constitutional and statutory rights. For over six decades, LDF attorneys have represented parties in litigation before this Court and other federal courts on matters of race discrimination in general, and employment discrimination in particular.

Marianne Sawicki is the petitioner in *Sawicki v. Morgan State University, et al.*, No. 06-603, now pending before this Court. The question presented in *Sawicki* is essentially the same as the question presented in the

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

instant case. Ms. Sawicki's Title VII claim was dismissed by the lower courts applying the ultimate decisionmaker standard adopted for the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005). Petitioner in the instant case is urging this Court to adopt the rule in *Hill*.

SUMMARY OF ARGUMENT

The employer in this case, as commonly occurs, took certain personnel actions as the result of a "chain of decisionmaking" (Pet. Br. 44). In that decisionmaking process several BCI officials played distinct roles and were allocated responsibility for making different types of decisions.

Whether an employee who plays a role in a decisionmaking process acts as an agent of the employer is governed by traditional agency law principles. The conduct of an official is properly imputed to his or her employer when the official "exercises the authority actually delegated to him by his employer." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70 (1986). Grado was doing precisely that when he carried out the established responsibility of a BCI supervisor to select which potential disciplinary matters to raise with the human resources department, and when he "presented the facts" to that department.

Employer liability is not limited to the conduct of the last decisionmaker in a chain of decisionmaking, the so-called "ultimate decisionmaker." In the case of a termination, that last decisionmaker – in this case the one who selected termination as the sanction – is not the only, or necessarily the most important, decisionmaking agent. "Agency principles [impose] vicarious liability for harm caused by misuse of supervisory authority." *Burlington*

Industries v. Ellerth, 524 U.S. 742, 764 (1998). That principle is equally applicable regardless of when in the decisionmaking process the misuse of authority occurs. The far different "ultimate decisionmaker" standard proposed by petitioner, and adopted by the Fourth Circuit, has – as a district judge in that circuit recently observed – "the unfortunate potential to create a safe harbor for workplace discrimination."

A plaintiff must demonstrate that an improperly motivated official, acting as an agent of his or her employer, took some act that caused the dismissal or other injury complained of. That improperly motivated act must be a but-for cause; it must have had "a determinative influence on the outcome" of the decisionmaking process. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 131, 141 (2000).

Neither a showing that the ultimate decisionmaker made an "independent judgment" about the facts presented by other officials, nor evidence that that decisionmaker undertook an "independent investigation" of the facts, will necessarily preclude in every case a finding that the invidiously motivated act caused the injury complained of. The exculpatory evidence proffered by an employer to show that a disputed adverse action was not caused by an earlier discriminatory act must specifically address the particular type of discriminatory act taken, and the manner in which that act assertedly brought about the adverse action.

I. UNDER AGENCY PRINCIPLES EMPLOYERS ARE LIABLE FOR THE CONDUCT OF EMPLOYEES IN THE EXERCISE OF THEIR AUTHORITY

This is a case about agency law. "[T]he courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 77 (1986). "[T]here is nothing remarkable in the fact that claims against employers for discriminatory actions . . . like . . . firing . . . have resulted in employer liability once the discrimination is shown." *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998).

Employer liability for a discriminatory discharge is an unremarkable application of the established agency principle that an employer is liable when its employee uses, or abuses, his or her authority. "[T]he supervisor acts within the scope of this authority when he makes discriminatory decisions in . . . firing. . . ." *Faragher*, 524 U.S. at 791. "[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so beyond the orbit of his responsibilities as to excuse the employer." *Shager v. Upjohn Co.*, 913 F.3d 398, 405 (7th Cir. 1990).

That principle is not limited to dismissals or any other particular type of official act. Regardless of the type of authority wielded by an official, "[i]t is well established that traditional vicarious liability rules make principals or employers vicariously liable for the acts of their agents or employee in the scope of their authority." *Meyer v. Holley*, 537 U.S. 250, 285 (2003); see *Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir.) (employer liable where

supervisor "wields the employer's authority"), *cert. denied*, 512 U.S. 1213 (1994); 2 F. Harper, F. James & O. Gray, The Law of Torts 24 (2d ed. 1956) (employer liable when "the servant is engaged in performing what he is hired to do"). "[W]here a supervisor exercises the authority actually delegated to him by his employer, by making decisions . . . affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to make them." *Meritor*, 477 U.S. at 70. "[T]he employer is vicariously liable for . . . company acts that can be performed only by the exercise of specific authority granted by the employer." *Burlington Industries v. Ellerth*, 524 U.S. 742, 768 (1998) (Thomas, J., dissenting). Such authority or power, "once granted, does not disappear like a magic gift when it is wrongfully used." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

The Restatement of Agency, in its various iterations, has embraced this rule. The Second Restatement of Agency states that an employer is liable for the torts of an agent where the agent "was aided in accomplishing the tort by the existence of the agency relation." (Restatement (Second) of Agency, § 219(2)(d).) The Third Restatement provides that an employer is liable for torts committed by employees "within the scope of employment," and defines scope of employment to mean "performing work assigned by the employer." (Restatement (Third) of Agency, §7.07).[2]

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[2] The action of an employee would be part of "an independent course of conduct," and thus outside his or her assigned duties, only if that conduct "represents a departure from, not an escalation of, conduct involved in performing assigned work." Section 7.07, comment b.

(Continued on following page)

Whatever differences may exist between these two articulations, they both embrace the rule long applied by this Court that an employer is liable for the conduct of its agent in exercising his or her official authority. That rule encompasses both authority in the sense of the power to direct the actions of others (e.g., to tell the personnel department whether to stop paying a worker) and authority in the sense of delegation of the responsibility to act in

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Petitioner makes much of the fact that the drafters of the Third Restatement, writing forty-two years after the adoption of Title VII, chose to omit the "aided in" language that was contained in the Second Restatement and that was relied on by this Court in *Ellerth* and *Faragher*. (Pet. Br. 42). This change, however, is expressly limited to the standard of vicarious liability "for a tort committed by an agent in dealing or communicating with a third party." Restatement (Third) of Agency § 7.08. The comment to section 7.07 explains that the Restatement's analysis of tort liability to third parties "is inapplicable to an employer's liability for one employee's tortious conduct toward a fellow employee, a topic being considered by the Restatement . . . Employment Law, in preparation as the Restatement, Third, Agency was completed."

To the extent that the drafters of the Third Restatement decided to omit the "aided in" standard in the Second Restatement, that is of no significance to the meaning of Title VII. The Second Restatement described prevailing law when it was adopted in 1958, and remained unquestioned for four decades after the enactment of Title VII. In directing that agency principles be applied to determine the scope of employer liability under Title VII, Congress did not intend to give to the members of the American Law Institute authority to promulgate, and change at will, legal standards accorded the great weight of federal regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The drafters candidly acknowledged that for years the "aided in" standard in section 219(2)(d) of the Second Restatement was "widely" construed in a literal manner. Restatement (Third) of Agency, § 7.08, Rptrs. Note b. The fact that the drafters (or, at least, the reporter) of the Third Restatement in 2006 feared that this widespread view of agency law would unduly expose employers to vicarious liability does not retroactively change the prevailing agency law on which Congress relied in enacting the 1964 Civil Rights Act.

the name of the employer (e.g., to decide whether to reimburse an employee for a claimed business expense).

Where a company official, acting with an unlawful purpose, uses his or her authority to dismiss an employee or take some other official action, the courts have held the employer liable without regard to *why* the official chose to discriminate on the basis of race, gender, national origin, age, disability, or other prohibited characteristic. Specifically, a plaintiff who has been the victim of a discriminatory official action is not required to prove that the official involved believed that that discrimination was somehow in the interests of the employer. Doubtless it is frequently the case that a biased official believes that employees of a particular race, gender, or age are inferior workers, but proof of such a belief is *not* necessary to establish employer liability for the exercise of official authority. Under *Faragher* and *Ellerth*, for example, an employer is strictly liable if a supervisor dismisses a subordinate because she spurned his sexual advances, even though the supervisor in doing so would be acting for "personal motives, motives unrelated and even antithetical to the objectives of the employer." *Ellerth*, 524 U.S. at 776.

The application of this principle is easy in a case in which a disputed employment action, such as a dismissal, was solely the result of a single decision. But, except for very small employers, employment actions are more often the result of a number of discrete decisions that may involve two or more different officials, each authorized to play a distinct role. This Court has repeatedly recognized that employers, rather than leaving decisions (particularly important decisions such as promotions and dismissals) to the exercise of ad hoc discretion, frequently utilize instead some sort of structured "decisionmaking process." *Reeves v.*

Sanderson Plumbing Products, Inc., 530 U.S. 133, 137, 141 (2000) (plaintiff dismissed by company president based on recommendations of and information from three supervisors); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236, 248 (1989) (partnership denied by Policy Board after comments by numerous partners and recommendation by Admissions Committee); see *Delaware State College v. Ricks*, 449 U.S. 250, 252 (1980) (tenure denied by Board of Trustees based on recommendation of tenure committee and Faculty Senate). Petitioner aptly characterizes such processes as involving a "chain of decisionmaking." (Pet. Br. 44).

Litigation in this Court and the lower courts illustrates the range of distinct decisions that, taken in concert, may lead to the dismissal of an employee:

(1) the adoption of rules regarding employee conduct, disciplinary procedures, and/or sanctions to be imposed,

(2) the initiation of the disciplinary process,

(3) assembling the body of information on the basis of which action will be taken,

(4) factual determinations,

(5) determinations as to whether the facts so found violate the employer's rules,

(6) recommendations regarding factual determinations, applicability of employer rules, or the appropriate sanction to be imposed, and

(7) the selection of the sanction to be imposed.

Any of these decisions can be among "the kind[s] of thing[s] that [an official] is authorized to do," *Shager*, 913 F.2d at 405, and a decisionmaking process simply could not function unless at least most of these responsibilities were given to some official or officials. Employers are free

to divide responsibility for these different decisions between or among any number of officials and employees.[3]

Each of these actions involves a distinct decision; thus a single employment action (e.g., a dismissal) may involve several different decisionmakers each dealing with different aspects of the process. Petitioner stresses that Edgar was "the decisionmaker"; that is correct in the sense that it was Edgar who made the decision to select dismissal (rather than, for example, suspension or demotion) as the sanction to be imposed. But Grado, too, made several key decisions; for example, it was Grado, and he alone, who decided to bring this entire matter to the attention of the Phoenix office – the only office, according to BCI, which could select dismissal as a decision.

In determining whether an employer is legally responsible for a particular decision in a chain of decisionmaking, the usual agency standards apply. For example, if a personnel recommendation were made by a company's president, the employer would be legally responsible, since such a high-ranking official is deemed an alter ego of the employer. *Ellerth*, 524 U.S. at 758 (citing Restatement (Second) of Agency, § 219(2)(a)). If making personnel recommendations was among the duties of a supervisor, human resources official or other employee, that employee's exercise of that authority would be an act of the employer. Conversely, if an employee who made an unsolicited recommendation (that, for example, a co-worker be fired) had no responsibility for making

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[3] Brief *Amicus Curiae* of the Equal Employment Advisory Council, 14 ("Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state.").

personnel recommendations, and did not act for the purpose (however misguided) of advancing the employer's interest, the employer would not be responsible for that recommendation or for a possibly invidious motive behind it. Similarly, an employer which decides not to hire an applicant because of the adverse recommendation of a former employer is not liable (at least absent some form of negligence on its own part) if that third party's negative report was motivated by a discriminatory purpose.

In the instant case, a reasonable trier of fact could certainly conclude that Grado was carrying out his official duties when he took the actions which led to Peters' dismissal. *First*, bringing personnel problems to the attention of the human resources department was clearly among Grado's official duties. As BCI itself stipulated, "Mr. Grado was responsible for monitoring the employees working under his supervision, and when an employee had an attendance, performance, and/or disciplinary issue, he was responsible for bringing the issue to the attention of the BCI Human Resources Department."[4] *Second*, when a disciplinary matter was under consideration by the BCI human resources department, it was the responsibility of the relevant manager – here Grado – to "present the facts" to the human resources official. Pederson explained that as a human resources official she would "rely on management to give me th[e] facts"[5] and made decisions based on

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[4] Memorandum in Support of Defendant's Motion for Summary Judgment, "Statement of Undisputed Material Facts" (p. 2), p. 4; see Declaration of Patricia Edgar, par. 2; Declaration of Cesar Grado, par. 8, 17; Declaration of Sherry Pederson, par. 2; Pet. Br. 5 ("under BCI's . . . system. . . . BCI supervisors such as Grado brought issues regarding employee discipline to the attention of Pederson [and] Edgar.").

[5] Pederson Deposition, p. 31.

"the facts presented to me" by the supervisor.[6] Grado described the role of a supervisor in similar terms. "I gather the facts and I present them to our HR department . . . I will put the facts in front of HR . . . I would present the facts to HR."[7] *Third*, there was substantial evidence that it was Grado (not Edgar) who on behalf of BCI made the critical (and incorrect) decision that Peters was not actually sick on September 30.[8] Clearly a decision as to what factual inferences an employer will draw from a body of information is "an official act of the enterprise, a company act," *Ellerth*, 524 U.S. at 762, requiring the exercise of delegated authority.

Regardless of whether Grado was biased, BCI objects that *other* company officials made a serious effort to prevent supervisors like Grado from engaging in racial discrimination. Human resources officials educated the workforce about Title VII, circulated anti-discrimination policies, and trained personnel such as Edgar to avoid discrimination. (Pet. Br. 33). But to the extent that Grado was using his official authority or otherwise carrying out his official responsibilities, Grado was as much an agent of

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[6] Pederson Declaration, par. 11; see Pet. Br. 15 (Edgar acted on the basis of "the facts presented to her.").

[7] Grado Deposition, pp. 31-32.

[8] In a letter dated July 12, 2002, to the EEOC, Edgar (writing on behalf of BCI) stated:

> Respondent's attendance policy states that misrepresenting a reason for absence is dishonesty and grounds for immediate termination. As a result of Mr. Peters' actions, Mr. Grado reached the reasonable conclusion that he had simply decided not to work as scheduled.

(Letter of Patricia Edgar to Geraldine Herrera, July 12, 2002, p. 2) (Exhibit B to the EEOC Response in Opposition to Defendant's Motion for Summary Judgment).

BCI as Edgar or the head of the human resources department. Agency law imposes strict liability on an employer for the conduct of *all* of its agents, in part because doing so creates a greater incentive than the negligence standard urged by petitioner. W. Seavey, Handbook of the Law of Agency, 141 (1984).[9]

Petitioner argues that "BCI could not have done anything more to comply with the statute." (Pet. Br. 14). But there was, of course, more that Grado could have done; he could have chosen not to discriminate on the basis of race. What petitioner means is that, even if BCI supervisors or managers engaged in invidious discrimination, there was nothing more that the BCI human resources department could have done to prevent those violations. But whether the human resources department did all it could is beside the point; Title VII applies to all of BCI's officials, not just to its personnel workers. Agency law imposes on a principal liability for the actions of its agents because the principal, having retained those agents to conduct its business and standing to profit from their activities, can in return fairly be held responsible for the injuries inflicted by those agents in the course of their activities.[10] At BCI profits are generated, not by the human resources personnel, but by operational managers like

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[9] 5 F. Harper, F. James & O. Gray, The Law of Torts, § 26.3, p. 15 (2d ed. 1986) ("Pressure of legal liability on the employer therefore is pressure put in the right place to avoid accidents. This reasoning has nothing to do with fault. It is true of course that liability based on a finding of the master's fault will put pressure on the employer to be careful. But the imposition of strict liability on an employer will exert even greater pressure. . . .").

[10] W. Seavey, Handbook of the Law of Agency, 141 (1984); 5 Harper, James & Gray, *supra*, § 26.5, p. 17; D. Dobbs, The Law of Torts, 908 (2000).

Grado, who actually solicit sales and deliver product, or who supervise those BCI employees who do. Grado is a profit center; Edgar is just overhead.

Finally, BCI complains that it would be impractical to oversee the activities, and detect any misconduct by, its thousands of employees, scattered as they are over a substantial number of states. (Pet. Br. 45). But it is the very purpose of agency law to impose responsibility and liability of that magnitude on principals that decide to hire a great number of agents in order to engage in a large commercial or other enterprise. BCI Coca-Cola is a subsidiary of Coca-Cola Enterprises, a multi-billion dollar corporation with vast assets and operations. The founders of that enterprise were not obligated to expand in this way, or to hire countless officials – like Grado – to staff an exceptionally successful corporate empire. The successors of Atlanta pharmacist Dr. John Pemberton, who invented Coca-Cola and originally brewed it in a kettle in his backyard, could have chosen instead only to make and deliver the beverage themselves; by doing so they could have avoided any need to supervise far flung subordinates, and any risk of liability for misconduct by persons other than themselves. Neither the owners of the very different and far more lucrative enterprise that emerged, nor subsidiaries like BCI, can justly complain if the magnitude of the vast operations that generate great income brings with it a commensurate degree of legal responsibility and potential liability.

II. EMPLOYER LIABILITY IS NOT LIMITED TO THE ACTIONS OF THE LAST AGENT INVOLVED IN A CHAIN OF DECISIONMAKING

Petitioner urges this Court to adopt a novel and quite extraordinary rule of agency law: when injury is sustained

as the result of a chain of decisionmaking by company officials, only the official who made the *last* decision is an agent of the employer. BCI frames this proposed rule somewhat opaquely, asserting that solely the "actual," "formal," or "true" decisionmaker is the agent of the employer. (Pet. Br. 20, 23, 47). The Fourth Circuit has aptly labeled this standard as requiring a discriminatory purpose on the part of "the ultimate decisionmaker." *Martin v. Mecklenburg County*, 151 Fed. Appx. 275, 280 (4th Cir. 2005). A chain of decisionmaking usually involves several decisionmakers. Petitioner's contention is that where a series of decisions, by several decisionmakers, result in the dismissal of an employee, only the last decision – to impose the sanction of dismissal – is legally "relevant." (Pet. Br. 15).

When BCI insists that Grado had no decisionmaking authority,[11] it is not denying that Grado had the power to make and actually made several decisions, e.g., the decision to call Edgar, the decision to provide certain information, the decision to not respond to Katt's phone calls, etc. Rather, BCI is asserting that only Edgar, and not Grado, had the power to make a particular decision, the decision to select dismissal – rather than, say, a suspension, or demotion, or a letter of reprimand – as the sanction to be imposed on Peters. Thus, BCI contends, when an employee is dismissed, only the official selecting that sanction acts as an agent of the employer.

There is simply nothing in agency law that supports this peculiar limitation on who is an agent. Petitioner's summary of argument opens with a straightforward assertion of agency law. "[P]rinciples of agency law . . . look

[11] Pet. Br. 16, 17, 19, 20, 23, 28, 40, 43.

to the employee who has 'principal responsibility' for the relevant employment decision. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)." (Pet. Br. 14). But the quoted phrase "principal responsibility" does not appear anywhere in the decision in *Ellerth*; indeed, this apparently pivotal quotation never reappears anywhere in petitioner's brief at all.

Later, petitioner asserts that

> [a]n employer may be liable for the conduct of its agents acting within the scope of their actual authority, *or, specifically,* when an adverse employment action is taken by its formal decisionmaker with discriminatory animus. *Faragher*, 524 U.S. at 790; RESTATEMENT (THIRD) OF AGENCY, §§ 2.04, 7.03(2)

(Pet. Br. 19) (Emphasis added). But whether an agent was utilizing his or her authority (as was Grado) emphatically is not the same thing (petitioner uses the phrase "or, specifically" to suggest an equivalence) as whether an agent made the "formal" decision (i.e., the last decision, to impose dismissal as a sanction). (Equating the two standards in this manner is like saying "The permissibility of using a designated hitter is governed by the rules for the American League, or, specifically, the rules for the National League.") Neither the phrase "formal decisionmaker," nor the proposed equation of these two very different standards, is anywhere to be found in *Faragher* or the cited sections of the Restatement.

Petitioner's proposal that only the person who "formal[ly]" takes an employment action is the employer's agent would largely override established agency principles. On this view, so long as Edgar selected dismissal as the sanction to be imposed on Peters, no one else involved in the decisionmaking process could be considered an

agent of BCI. Those other decisionmakers would not be acting as BCI agents even if a decision to refer for discipline only blacks who object to Sunday work had been made by the BCI board of directors, or if a pretextual finding that Peters was loafing on September 30 (rather than actually sick) had been made by BCI's president.[12] Under that same approach, BCI would not be liable in tort if Grado had an accident while driving a delivery truck he knew had defective brakes, so long as it was Edgar who made the final decision to permit use of the truck and Grado had never told Edgar that the brakes did not work.

If this standard were adopted by this Court as a *general* rule of agency law, the ramifications would reach far beyond Title VII. The United States Code is replete with provisions whose applicability depends (like certain Title VII claims) on the existence of a particular intent or purpose. (Westlaw reports that more than 3,000 federal provisions use the term "intent.") Insofar as these laws apply to corporations, government bodies, or other entities

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[12] Petitioner repeatedly argues that it should not be liable for discriminatory conduct by a "subordinate" official in the decisionmaking chain. (Pet. Br. 15, 16, 28, 29, 32, 43, 45, 47). But the logic of BCI's argument is fully applicable regardless of whether the earlier participants in that chain of events outranked Edgar.

In this case it is not clear in what sense, if any, Grado was the "subordinate." The record does not suggest that Edgar was Grado's supervisor, that she outranked him in some company system of job grades, that she supervised a larger number of actual subordinates, or that she was paid more than he was. This is, rather, a situation in which Edgar and Grado had been given different responsibilities within BCI and different roles to play in a disciplinary matter.

In the armed forces, the court martial convening authority will usually outrank the officers, and will always outrank any non-commissioned officers, who sit on the court martial panel and determine guilt and punishment.

of any size, their effectiveness and even viability would be substantially impaired if the only intent that mattered was the motive of the employee who made the last, formal decision in a decisionmaking chain. If, for example, supervisors at a government contractor prepared lavishly exaggerated statements of expenses and wrote up charges for costly but non-existent services, the False Claims Act would not be violated so long as the accountant who finalized and submitted the bill to the United States did not know what was going on. A wide range of statutes that govern the rights of corporations and legal relations among them – copyright, patent, securities, anti-trust, trade and other laws – would be seriously affected. It is perhaps for that reason that the National Chamber of Commerce does not endorse the extraordinary agency rule proposed by BCI, but insists instead that an employer is responsible for the misuse of *any* "delegated authority" by a company official.[13]

In the instant case, BCI contends that Grado accurately reported to Edgar what was occurring in the Albuquerque office. But on petitioner's view, it would not have mattered if Grado was lying through his teeth. BCI insists that it would not be liable even if what really happened was that Peters happily agreed to the requests from Katt and Grado that he work over the weekend, that Peters in fact put in a full day's work on Sunday, and that Grado nonetheless used his official position to sell Edgar a completely different story fabricated by Grado because he believed African-Americans are racially inferior. Similarly, if Grado acting for such an invidious purpose submitted

[13] Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner, 4, 16, 18, 20, 21.

time or sales records for Peters that understated the hours he had worked or the amount of sales for which he had earned commissions, on petitioner's view BCI would not be liable so long as the officials in the payroll department who underpaid Peters did not know that they were receiving inaccurate information.

The sole exception suggested by BCI to its proposed "formal decisionmaker" rule is an equally strange departure from agency law. An employer would be legally responsible for the motives of any person who had such "leverage or influence" that he could "impose his will" on or "dupe" the formal decisionmaker. (Pet. Br. 24).[14] Under BCI's theory, agency could be established by showing that some such other person had an overbearing personality (like the influence of the monk Grigori Rasputin over Tsar

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[14] Petitioner also argues that Edgar was not Grado's "cat's paw." (Pet. Br. 14, 15, 23, 24, 28).

The charming fable at issue, created in the seventh century B.C. by the Greek writer Aesop, and put into verse by the seventeenth century French poet Jean de La Fontaine, has outlived its usefulness as a guide to the meaning of twenty-first century agency law.

In the Aesop fable, a monkey and a cat observe chestnuts roasting on a fire in the home of their owner. The monkey persuades the cat to pull the chestnuts from the fire, promising to share the chestnuts and flattering the cat with compliments about his feline dexterity. The cat (after an independent evaluation of the circumstances) is persuaded by the monkey, and pulls chestnuts from the fire, singeing his paw in the process. Unfortunately for the cat, he (like Edgar in dealing with Grado) had misjudged the motives of the monkey. While the cat is taking the chestnuts from the fire, the monkey eats them all.

Nothing that occurs in the employment context bears any resemblance to the tactics used by the monkey in this story. Supervisors do not persuade personnel officials to fire workers by promising to share some sort of bonus that the supervisor will receive as a result of the dismissal; employers do not provide financial rewards for adverse employment actions.

Nicholas II), wove a hypnotic trance (like the evil Svengali in George Du Maurier's nineteenth century novel *Trilby*), or used trickery to bamboozle the formal decisionmaker (as did Delilah in persuading Samson to disclose the source of his great strength.) It apparently would not matter, however, whether this other highly influential person was not an employee of the defendant. On the other hand, traditional agency considerations, such as delegated job responsibilities, the exercise of official power, or an intent to serve one's employer, could not be relied on to show that any other person was acting as an agent. Unsurprisingly, BCI does not point to anything in any version of the Restatement of Agency supporting such distinctions.

This proposed limitation on agency-based liability cannot be reconciled with the past decisions of this Court. In both *Ellerth* and *Faragher* this Court expressly acknowledged and applied the "agency principle[ ] of vicarious liability for harm *caused by* misuse of supervisory authority." *Ellerth*, 524 U.S. at 764 (emphasis added); *Faragher*, 524 U.S. at 577 (emphasis added); see *Meritor*, 477 U.S. at 70 (employer liable for use of delegated authority "*affecting* the employment status" of a worker) (emphasis added). *Reeves* reiterated that a discrimination plaintiff can prevail by demonstrating that an impermissible consideration "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." 530 U.S. at 141 (*quoting Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (bracketed material in *Reeves*)).

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) illustrates the principle that employer liability is not limited to situations in which the person actually

taking the adverse action acted with a discriminatory purpose. In *Lorance* the plaintiffs were demoted in 1982 as a result of the application of a seniority rule that had been adopted in 1979. There was no claim that the company officials who in 1982 actually ordered the demotion had themselves acted with an unlawful purpose; the alleged discriminatory purpose was on the part of earlier company and union negotiators who drafted the facially neutral seniority rule. Under BCI's view of agency law, the benign purpose of the 1982 demotion decision (taken by the "formal decisionmaker") would by itself have barred any Title VII claim; the earlier invidiously motivated rule adoption would have been legally irrelevant. This Court, however, agreed that the plaintiffs would have been entitled to relief if the invidiously motivated seniority rule had itself been the subject of a timely Title VII charge. 490 U.S. at 906-13.

Nothing like the rule proposed by petitioner exists in analogous areas of anti-discrimination law. If a government employee was targeted for discipline because he was African-American and found guilty of misconduct because he was a Baptist, no one would seriously claim that his dismissal was nonetheless constitutional because the official who then imposed the sanction of dismissal did not know what was going on. Similarly, if a defendant had been arrested by a biased police officer because he was Hispanic, indicted by a biased prosecutor because he was Catholic, and convicted by a biased jury because his parents were from Mexico, the defendant's resulting imprisonment would violate equal protection – and could be successfully challenged in a habeas corpus proceeding – regardless of whether the sentencing judge was personally unaware of those earlier discriminatory acts.

BCI's insistence on focusing solely on the last decision – in a dismissal case the decision to select termination as the sanction – makes little practical sense. In many situations that "formal decision" may be little more than a formality. In the instant case, for example, BCI's human resources officials insisted that their role was limited to (1) determining whether the "facts presented" by management constituted a violation of some BCI rule, and (2) determining what sanction was required for that particular violation.[15] BCI argues that the facts presented to Edgar clearly constituted flagrant insubordination, and that dismissal was the obvious penalty for such insubordination. Once Grado had decided to take the matter up with the Phoenix office, and "presented" the "facts" regarding the events of September 28-30, the result may well have been virtually a foregone conclusion. Similarly, in *Lorance* the "formal decisionmakers" who demoted the plaintiffs both properly and predictably applied the relevant rules to the circumstances before them; the critical decisions had been made by others several years earlier.

The agency rule proposed by BCI permits an employer to place largely outside the reach of Title VII almost all of the decisions leading to an adverse employment action. The employer could generally do so by giving responsibility for the "ultimate," sanction-fixing decision to an official who personally has no other role in the decisionmaking

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[15] Declaration of Cesar Grado, par. 6 ("I bring the facts relating to the matter to the attention of our Human Resources Department. The Human Resources representative then makes the decision about which company policy or policies applies in the situation, if any, and the appropriate action to take based upon what has occurred."); Declaration of Sherry Pederson, par. 2; Pederson Deposition, pp. 30-31; see Pet. Br. 4 ("A Human Resources representative . . . determines whether a workplace policy applies to the situation and orders appropriate action.").

process. That was precisely the allocation of decisionmaking roles in the leading Fourth Circuit decision of *Hill v. Lockheed Martin Logistics Mgmt. Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc). In *Hill* the only decision made by the "actual decisionmakers" was to determine the level of sanction.[16] The National School Boards Association represents that school boards virtually always limit their role in disciplinary matters to selecting the appropriate sanction based on the recommendation of and information provided by school administrators. The Association insists that school boards have no legal responsibility under Title VII for any discrimination by those administrators.[17] Absolving employers in this manner of responsibility for any and all discriminatory actions occurring prior to the "ultimate decision" will immunize from the prohibitions of Title VII much, in some instances virtually all, invidiously motivated conduct. As a district court judge required to administer the Fourth Circuit's "ultimate decisionmaker" standard recently observed, "[t]he rule has the unfortunate potential to create a safe harbor for workplace discrimination by any

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[16] The allegedly biased job site official was entirely responsible for initiating the disciplinary actions (a flurry of misconduct charges immediately following Hill's complaint of discrimination), making the relevant factual findings (allegedly knowingly inaccurate), and determining that the facts so found violated company rules. 354 F.3d at 282-83 (majority opinion), 300-01 (dissenting opinion).

[17] Brief of *Amicus Curiae* National School Boards Association in Support of Petitioner, 4-5:

> [M]ost school boards have no role in evaluating employees, in investigating employee complaints, or in developing recommendations for . . . discipline, or termination. . . . [S]chool boards rely on the recommendations and input of administrators to inform their . . . decisions. . . . [A] school board will only act based on the facts presented to it.

(Footnote omitted).

prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions."[18]

BCI insists that an employer could not permit the "formal" decisionmaker to be the "conduit" of the biases of other officials. (Pet. Br. 23, 47-48). But a decisionmaking process in which different decisionmakers are responsible for distinct decisions is by definition one in which the later decisionmakers are conduits for the actions and purposes of those who acted earlier. In this case Edgar worked 470 miles from the Albuquerque office; she had never met Peters, did not have a copy of his personnel file, and concluded (since it was Grado's job to "present the facts") that there was no need to hear Peters' side of the story or talk with Peter's immediate supervisor, Katt. BCI insists that Edgar was not "isolated" from what was really happening; as a practical matter, the "formal" decisionmaker in this situation would hardly have been more isolated if BCI had outsourced its personnel decisions to an office in Bangalore. The problem, however, concerns not isolation but the very nature of this type of decisionmaking process. Whenever an employer takes action on the basis of a chain of decisionmaking, the acts of an official who participates at an earlier stage in the process always have the potential to turn the events that follow into a conduit for achieving his or her purposes.

III. AN EMPLOYER IS LEGALLY RESPONSIBLE FOR INJURIES CAUSED BY THE DISCRIMINATORY CONDUCT OF ITS AGENTS

Title VII imposes liability on an employer for an adverse action brought about by the discriminatory conduct of one of

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[18] Petition for Writ of Certiorari, *Sawicki v. Morgan State University*, No. 06-306, App. 20a.

its agents.[19] When a biased supervisor personally decides to fire a worker, the causal connection between that decision and the resulting injury is obvious; the decision causes injury because it invariably leads other officials to take the specific acts which directly inflict harm – the payroll department stops issuing paychecks and the front desk or gate no longer permits the worker to enter the office or plant. When the alleged discriminatory official did not directly order the adverse action, the plaintiff must make two specific demonstrations. First, the plaintiff must prove that the biased official in question took some act with a discriminatory purpose.[20] Second, the plaintiff must

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[19] In some situations the discriminatory conduct that brought about the injury will itself have occurred so long before that injury that it lies outside the 180 or 300 day charge filing period. If, as in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the conduct mandates a particular adverse action, which is postponed for some specific period of time (in *Ricks*, for a year), the employee may have to file a charge without awaiting that injury. Similarly, if (as in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977)), the discriminatory conduct causes a substantial injury at the time when it occurs (e.g., a discriminatory layoff), the employee must file a charge at that point, and cannot do so for the first time only when subsequent developments give that discriminatory act additional impact (e.g., a second layoff because of the failure to accrue seniority during the first layoff period).

On the other hand, in some cases the initial discriminatory act may have little or no practical consequence at the time, and may affect the employee only because of subsequent developments. For example, under a progressive discipline system, a worker might receive only a letter of reprimand for his or her first infraction (an action with no economic or other consequence), and later be fired because a subsequent infraction was his or her second. If in such a situation a worker is cited for a first infraction by a discriminatory supervisor, Title VII does not require the worker to file a charge with EEOC, and ultimately a lawsuit, to challenge a discriminatory action which as yet has not had, and might never have, any significant adverse impact.

[20] Under section 703(m) of Title VII, the plaintiff need only prove that an invidious purpose was "a motivating factor" behind the act in

(Continued on following page)

demonstrate that this improperly motivated conduct actually caused the adverse action that injured the plaintiff. The plaintiff must establish but-for causation: if the improperly motivated conduct had not taken place, the complained-of-injury would not have occurred.

Resolution of the issue of but-for causation will often turn largely on the trier of fact's assessment of the credibility of the officials involved. The respective actions of those various officials may consist of verbal exchanges (in this case, a series of telephone calls), and all the relevant witnesses are likely to be employees of the defendant. Written allocations of decisionmaking roles may not exist, and even if extant might not have been followed. In some instances causation may depend largely on the thought process of a particular official; did he or she, for example, give any weight to the recommendation of another, allegedly biased official? However specific, consistent, and self-exonerating the testimony of the defendant's officials, it will usually be for the trier of fact to decide, at times based largely on demeanor and cross-examination, whether their testimony is to be believed. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000).

The circumstances of this case illustrate the critical role of the trier of fact. On the day that Peters was dismissed on October 2, 2001, he was given a written statement signed by Grado and Pederson explaining the dismissal was based on his failure to come to work on

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question. If the employer demonstrates that the discriminatory official would for other reasons have taken the same act, even absent that impermissible motivating factor, the employer is still liable, but the remedies available are substantially limited. 42 U.S.C. § 706(g)(2)(B).

September 30.[21] That same explanation was repeated on October 16, 2001, in a written statement submitted by Pederson to the New Mexico Department of Labor.[22] In November 2001, Edgar wrote to the EEOC offering a second, perhaps more persuasive account, stating that Peters was fired because, having promised to bring Pederson and Grado a note from his physician, Peters failed to do so.[23] In July, 2002, Edgar gave the EEOC a third, possibly even more convincing explanation, insisting that Peters was dismissed because Grado concluded that Peters had lied to Katt about being sick on Sunday, September 30.[24] Finally, in February 2004, Edgar signed, in support of BCI's motion for summary judgment, a statement with yet a fourth account, explaining that she had fired Peters because his remarks to Edgar on Friday, September 28 were an act of insubordination. The 2004 declarations by Edgar and Grado regarding their respective roles in the decisionmaking process are consistent with Edgar's 2004 account of why Peters was dismissed, but not with Edgar's July 2002 explanation, with Edgar's November 2001 explanation, with Pederson's October 2001 explanation, or

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[21] Defendant's Motion for Summary Judgment, Exhibit B-3. The notice, evidently written by Grado, stated "I explained how [the order to work on September 30] was a direct order and failure to comply with the directive would be considered insubordination. . . . You did not report on Sunday 9-30-01, and therefore your employment is being terminated for insubordination."

[22] Plaintiff EEOC's Response in Opposition to Defendant's Motion for Summary Judgement, Exhibit I ("[Peters] was told by Cesar Grado that if he didn't show up, it would be considered insubordination.").

[23] *Id.*, Exhibit J ("Mr. Peters told Mr. Grado and the local HR Administrator, Sherry Perderson, in a meeting that he had a doctor's note, but he did not provide one.").

[24] See n.8, *supra*.

with the explanation set forth in the dismissal statement signed in October 2001 by Grado and Pederson.

BCI's summary judgment motion relied heavily on the type of interested, unverifiable testimony which the trier of fact, although permitted to accept, is not required to believe. In declarations filed some three years after Peters was dismissed, Edgar and Grado provided (largely for the first time) pointedly detailed descriptions of exactly what they had said to one another in private telephone conversations on September 28 and October 1, 2001.[25] Edgar and Grado also swore to highly nuanced accounts of their respective motives in each of those conversations.[26] BCI repeatedly insists that all this self-exonerating testimony was "undisputed." (Pet. Br. 11, 15, 37, 39). It is, of course, true that no one but Edgar and Grado was on the phone during the critical conversations, and that only Edgar and Grado, respectively, had personal knowledge of what was

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[25] According to those accounts, Grado offered no recommendations, made no requests regarding how Peters was to be dealt with, never disparaged Peters, only asked Edgar for help in solving his staffing problem, and did not "confer" with Edgar about whether or how Peters should be disciplined. (Pet. Br. 8, 9 n.4, 25). For her part, Edgar assertedly never asked Grado's views about the matter, and carefully instructed Grado to find out if Peters had called in to Katt about being absent on September 30. (Pet. Br. 9, 25).

[26] Grado insisted that when he first called Edgar his sole purpose was to seek advice about his authority to order Peters to work on his day off, that he never envisioned or intended that the call would lead to any disciplinary action (Pet. Br. 37, 39, 49), and that at no point in any of the conversations did he intend to influence what Edgar would decide. (Pet. Br. 24). Edgar recalled with equal clarity that it was she who concluded, from the fact that Peters had called Katt rather than Grado, that Peters was not really sick (Pet. Br. 11, 25-26; but see n.8, *supra*), and that she decided to fire Peters because of insubordinate remarks on Friday, September 28, not because he failed to go to work on Sunday, September 30. (Pet. Br. 26 n.9, 27 n.10).

on her or his mind during those critical days. But that circumstance does not provide the solution to this controversy; rather, it frames the very problem that the trier of fact must resolve. Were such self-serving statements about matters known directly only to the defendant's own employees deemed conclusive, few Title VII claims would ever survive to trial. *Reeves* makes clear that it is ordinarily for the trier of fact to decide whether such accounts are reliable and credible, or are merely clever after-the-fact explanations contrived to explain why a worker who had permission from his supervisor not to work on Sunday, September 30, and who was in fact sick on that day, was nonetheless later told that he was being fired for not working on September 30.

BCI contends that, regardless of the nature of a discriminatory official act or the way in which it might tend to lead to an adverse action, there is one method by which an employer always can prove that that discriminatory act did not cause any subsequent adverse action; the employer need only demonstrate that the final decisionmaker made an "independent evaluation" of the facts. (Pet. Br. 48). The Tenth Circuit took a different approach, holding that an employer always can prove that an alleged discriminatory act did not cause a subsequent adverse action by demonstrating that the final decisionmaker made an "independent investigation" of the relevant facts. (Pet. App. 21a). Neither of these proposed per se rules adequately takes into account the wide variety of ways in which such a discriminatory act would lead to the dismissal of, or some other adverse action against, an employee.

There are, to be sure, situations in which a finding that the final decisionmaker made such an independent

evaluation would demonstrate the lack of the requisite causation. If the sole alleged discriminatory act was a biased recommendation that an employee be dismissed, an employer would prevail if the trier of fact concluded that the ultimate decisionmaker had expressly disregarded any recommendations, and had made an independent, de novo evaluation of the evidence and appropriate sanction. But such an independent evaluation would be entirely ineffective in breaking the causal connection if the discriminatory action at issue consisted of providing the final decisionmaker with false inculpatory evidence. (Regardless of whether a jury independently evaluates the evidence before it, a conviction would not be valid if the defendant was arrested, searched and prosecuted because of his race, or if the prosecutor knowingly introduced highly inculpatory perjured testimony.)

Similarly, an independent investigation would break the causal connection if the discriminatory act was providing inaccurate information, and that independent investigation led the ultimate decisionmaker to disregard that misinformation, and to base an adverse decision on other, untainted evidence. But such an independent investigation would be beside the point if the discriminatory act was not providing false information but making a biased recommendation (e.g., to fire rather than merely reprimand the worker), and the ultimate decisionmaker – after personally looking into the facts – gave dispositive weight to that tainted recommendation.

In all cases, exculpatory evidence proffered by an employer to show that the adverse action was not caused by an earlier discriminatory act must specifically address the particular type of discriminatory act alleged, and the

manner in which that act assertedly brought about the disputed adverse action.

Where an employer confers upon a given official the authority to take a significant step in the disciplinary (or other decisional) process, and the official uses that authority to take a discriminatory act likely to cause injury, it will not invariably be the case that a second official – at a later point in the process – will be able to remove the resulting taint of the decisionmaking process. In the instant case, for example, the government contends that Grado engaged in race-based selective reporting, notifying Edgar that Peters had refused to work on a weekend, even though Grado would not have so reported a white or Hispanic worker who had done the same thing. If such selective reporting indeed occurred, nothing thereafter done by some other BCI official could eliminate the but-for causation; if Peters had been white or Hispanic, Edgar would not have been called, Grado would not have issued an ultimatum, Pederson would never have been asked to pull Peters' old file, and no one would have questioned Peters' bona fides when he called in sick. BCI, having opted to give Grado control over whether to take the steps that would trigger a disciplinary process, cannot complain if as a practical matter no other official was thereafter in a position to undo the resulting impact of that biased act on the decisionmaking process. Under Title VII, unlike friendly games of golf, there are no mulligans.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

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